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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 22 1989

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Water Quality Standards Cooperative Agreements
FROM: David K. Sabock, Chief
Standards Branch (WH-585)
TO: Water Quality Standards Coordinators
Regions I-X

A legal opinion bearing on two questions raised by Region 6 with respect to Indian Tribes and States developing cooperative agreements on water quality standards is attached for your information. We believe there will be significant use of such agreements, at least initially.

Attachment

cc: Caren Rothstein, OW



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

AUG 22 1989

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Approval of State Water Quality Standards on Indian Reservations

FROM: Randolph L. Hill *RLH*
Attorney

TO: David K. Sabock
Chief, Standards Branch
Office of Water Regulations & Standards (WH-585)

THRU: Lee C. Schroer *LS*
Acting Associate General Counsel
Water Division (LE-132W)

This memorandum is in response to your memorandum of August 2, 1989 entitled "Indian Tribes and Water Quality Standards." You have asked for a legal opinion on the following two questions:

1. Is our approval of a signed cooperative agreement between a State and an Indian Tribe the only action needed for state water quality standards (WQS) to be approved as standards for reservation waters? Is there a need for a public hearing or other process?

2. Does EPA have any formal review responsibility or authority with regard to such cooperative agreements?

ANSWERS

1. Assuming that any previous approval of and/or revision to WQS for that State did not purport to apply to waters on the reservation, the State would need to follow the approval process outlined in 40 CFR § 131.20, including the need for public participation, prior to application of the standards.

If the State had previously submitted standards that clearly purported to apply to waters on the reservation and EPA approved those standards, the state would only need to clarify that the standards continue to apply to reservation waters during its next triennial review process.

2. EPA is specifically given the authority to review and approve any cooperative agreement between a Tribe and State to jointly plan and administer the requirements of the CWA. EPA need not separately approve a cooperative agreement regarding application of WQS on the reservation; EPA could review such an agreement in the context of approving WQS submitted for approval in either of the situations discussed in the answer to question 1.

DISCUSSION

Question 1

Section 303(a) of the CWA requires each State to develop and submit to EPA WQS for all interstate waters within 90 days and all intrastate waters within 180 days of the date of enactment of the 1972 amendments to the Federal Water Pollution Control Act (now referred to as the CWA). Section 303(c)(1) of the CWA requires a State to hold public hearings at least every three years "for the purpose of reviewing applicable water quality standards, and, as appropriate, modifying and adopting standards." Such revisions in WQS must also be submitted to EPA for approval under Section 303(c)(2) and (3).

The conclusion of a cooperative agreement between a Tribe and a State to apply state WQS to all intrareservation or reservation/state boundary waters effectively establishes (or reestablishes) WQS for the relevant waters. As such, the establishment of such standards falls within the requirements of Section 303(c) and EPA's implementing regulations at 40 CFR §§ 131.20-.21. Therefore, while the cooperative agreement need not necessarily be submitted to EPA for approval (see question 2 below), the cooperative agreement cannot be considered effective until the state standards are submitted to and approved by EPA for the relevant waters. Furthermore, the public participation requirements of § 131.20(b) must be followed prior to submission of the standards.

The timing of the submission of standards by the State depends upon whether the State standards were previously approved by EPA for the relevant waters. If EPA had not approved state standards which purported to apply to reservation waters in the past, then arguably no standards are clearly in place for the reservation, and, by analogy to Section 303(a), the State should submit the standards to EPA within 180 days of the conclusion of the cooperative agreement. If EPA had approved state standards

for reservation waters in the past, clarifying the applicability of those standards through the agreement would be akin to subsequent modification or approval under Section 303(c), and thus the State could elect to address the continued application of these standards during its next triennial review sequence. However, even in this situation, the State could elect to submit the standards to EPA for approval as soon as the cooperative agreement were signed.

Question 2

Section 518(d) of the CWA states:

In order to ensure the consistent implementation of the requirements of this Act, an Indian tribe and the State or States in which the lands of such tribe are located may enter into a cooperative agreement, subject to the review and approval of the Administrator, to jointly plan and administer the requirements of this Act.

We interpret this language to mean that the Administrator will determine whether the cooperative agreement establishes plans and procedures and/or creates substantive requirements which are consistent with the CWA.

A cooperative agreement to apply state WQS on reservation water arguably falls under Section 518(d), since establishment and review of WQS is a "requirement" of Section 303 of the Act. Thus, we believe that EPA does have authority to approve or disapprove such an agreement.

We do not, however, interpret Section 518(d) as requiring EPA to undertake a separate review process to approve a cooperative agreement for the establishment of state WQS on the reservation. Rather, when the state submits the WQS for approval (as discussed in the response to Question 1 above), EPA will have the opportunity to determine whether the cooperative agreement is proper under Section 518(d) in the context of the WQS approval process.

If you have any questions regarding this memorandum, please contact either of us at 382-7700.